FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-749

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION and THE UPJOHN COMPANY,
Petitioners,

—against—

THE GOVERNMENT OF INDIA, THE IMPERIAL GOVERNMENT OF IRAN and THE REPUBLIC OF THE PHILIPPINES,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' JOINT REPLY BRIEF

JULIAN O. VON KALINOWSKI
515 South Flower Street
Los Angeles, California 90071

JOE A. WALTERS
3800 IDS Tower
Minneapolis, Minnesota 55402

JOHN H. MORRISON
200 East Randolph Drive
Chicago, Illinois 60601

JOHN P. LYNCH
7820 Sears Tower
Chicago, Illinois 60606
Attorneys for Petitioner
Pfizer Inc.

MERRELL E. CLARK, JR.
40 Wall Street
New York, New York 10005
Attorney for Petitioner
Bristol-Myers Company

ROBERTS B. OWEN
888 Sixteenth Street, N. W.
Washington, D.C. 20006
Attorney for Petitioner
The Upjohn Company

SAMUEL W. MURPHY, JR.
KENNETH N. HART
WILLIAM J. T. BROWN
30 Rockefeller Plaza
New York, New York 10020

PETER DORSEY
2400 First National Bank Building
Minneapolis, Minnesota 55402
Attorneys for Petitioner
American Cyanamid Company

ALLEN F. MAULSBY
One Chase Manhattan Plaza
New York, New York 10005
Attorney for Petitioners
Squibb Corporation and
Olin Corporation

GORDON G. BUSDICKER
1300 Northwestern Bank Building
Minneapolis, Minnesota 55402
Attorney for Petitioners
Bristol-Myers Company,
The Upjohn Company,
Squibb Corporation and
Olin Corporation

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' JOINT REPLY BRIEF

Petitioners submit this brief in reply to the joint brief for respondents ("Resp. Br."), the memorandum for the United States as amicus curiae dated August 1977 ("Gov. Mem. II"), and the brief for the Federal Republic of Germany as amicus curiae ("Ger. Br.").

The arguments of respondents and the amici concern two distinct questions: *first,* whether Congress intended the term "person," as employed in sections 7 of the Sherman Act and 4 of the Clayton Act, to include foreign governments; *second,* whether, as a matter of policy, this Court should authorize treble damage suits by foreign governments.

ARGUMENT IN REPLY

I.

Congress Did Not Intend to Confer a Cause of Action for Treble Damages Upon Foreign Governments, and It Legislated in Terms Which It Understood to Preclude Such a Result.

Respondents offer no evidence that Congress intended to grant foreign governments the treble damage remedy which it withheld from the United States. They contend

instead that such an intention should be imputed to Congress on a variety of grounds, and that the contrary evidence of the legislative environment should be disregarded.

1. Judicial Decisions Prior to 1890 Confirmed that "Person" Did Not Include Sovereign Governments Unless Specially Extended.

The respondent foreign governments are quite wrong in asserting that it was "settled law" in 1890 that the word "person," when used in a statute, presumptively included sovereign governments, and that Congress would have so understood the term. Resp. Br. 26-27. In the leading case, *United States* v. *Fox*, 94 U.S. 315 (1876), this Court had held that although the term "person" might be used in an enlarged sense so as to include a sovereign government, such as that of the United States, "[i]t would require an express definition to that effect to give it a sense thus extended." 94 U.S. at 321. In 1941 this Court relied upon the *Fox* case when it stated, in *United States* v. *Cooper Corp.*, 312 U.S. 600, that "in common usage, the term 'person' does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it." 312 U.S. at 604. The rule of the *Fox* case applies both to the domestic sovereign and to foreign sovereigns.[1] *Fox* has never been overruled, and Congress was entitled to suppose that the Sherman Act would be construed in accordance with that rule.[2]

1. For purposes of the New York statute at issue in *Fox*, the United States was not the domestic sovereign but a "foreign" government—a coordinate sovereign outside the jurisdiction of New York. *See United States* v. *United Mine Workers*, 330 U.S. 258, 275 (1947) ("person" does not include "sovereign governments").

2. Our adversaries argue that another New York case decided in 1889, and never reviewed by this Court, casts doubt upon *Fox's* principle of statutory construction. *See* Resp. Br. 30 n.30; Gov. Mem. II 5 n.4. But that case, *Republic of Honduras* v. *Soto*, 112 N.Y. 310, 19 N.E. 845 (1889), applied the very same rule of construction, since it held that, in a statute requiring nonresident plaintiffs to post bond for court costs, a reference to any "person residing without the state" was expressly defined to extend to all plaintiffs, since the statute was "stated to be a re-enactment of the previous [version of the] statute," which had required such a bond of "any plaintiff, not residing within the jurisdiction . . . ." Since there was evidence that the legislature had intended no change, "the word 'person' was, we think, used in its enlarged sense . . . ." 112 N.Y. at 311-12, 19 N.E. at 845-46. The decision reflected concern that if a foreign government were allowed to sue without posting a bond for costs, it could not subsequently be compelled to pay those costs. *See, e.g., Dexter & Carpenter, Inc.* v. *Kunglig Jarnvagsstyrelsen*, 43 F.2d 705, 708 (2d Cir. 1930), *cert. denied*, 282 U.S. 896 (1931). *Compare* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1609-1610 (1976).

The dictum in *Dollar Savings Bank* v. *United States*, 86 U.S. (19 Wall.) 227 (1873), upon which respondents purport to rely (Resp. Br. 27), also confirms that, at common law, a statutory prohibition addressed to "any person or persons, bodies politic or corporate" was *not* understood to include the domestic sovereign. 86 U.S. at 239. It was sometimes said that the King might "take the benefit of any particular act, though not named" (*id.*), but that rule, and its various corollaries, operated only for the benefit of the domestic sovereign, "the government by which [the statute] is enacted." *See In re Receivership of the Columbian Marine Insurance Co.*, 3 Keyes 123, 125 (N.Y. 1866). *See also In re Fox*, 52 N.Y. 530 (1873), *aff'd*, 94 U.S. 315 (1876). There is no room for implied remedies under the Sherman Act, even for the benefit of the domestic sovereign, because, as this Court established long ago, Congress intended the remedies fixed by the Sherman Act to be exclusive, and "available only to those on whom they are conferred by the Act." *United States* v. *Cooper Corp.*, 312 U.S. 600, 604 (1941). *See Geddes* v. *Anaconda Copper Mining Co.*, 254 U.S. 590, 593 (1921); *Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U.S. 27, 29 (1916); *D. R. Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U.S. 165, 174 (1915).

Respondents also cite two cases from the period prior to 1874 in which a sovereign government was described as an "artificial person." *Cotton* v. *United States*, 52 U.S. (11 How.) 229, 231 (1850) (Resp. Br. 27-28); *Republic of Mexico* v. *Arangoiz*, 5 Duer 634, 637 (N.Y. 1856) (Resp. Br. 29 n.28). But those cases did not concern the construction of the term "person" as employed in a statute; rather, they used the term in its metaphorical sense and established, not that sovereign governments were "per-

sons," but that, like persons, they could contract, acquire property and vindicate their rights in court. Other cases reached the same conclusion without describing such a government as an artificial person.[3]

2. Upon Revision of the Statutes in 1874 Congress Took Care to Ensure that "Person" Would Not be Inadvertently Extended to Include Foreign Governments.

While respondents and the amici appear to disagree with us and with each other as to the significance of the revision of 1874 (*compare* Resp. Br. 33-36 *and* Gov. Mem. II 8-9), the essential points are undisputed. Congress had enacted the general definitional statute of 1871 in order to facilitate the task of the Commissioners who were preparing the Revised Statutes. *See* CONG. GLOBE, 41st Cong., 3d Sess. 776 (1871), cited Pet. Br. 19. As enacted, it provided that "the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that [it was] intended to be used in a more limited sense."[4] But in 1872 the Commissioners recommended that Congress delete the phrase "bodies politic and corporate" and replace it with a reference to "partnerships and corporations." As the Commissioners explained,

> The reasons for the latter change are that partnerships ought to be included; and that if the phrase "bodies politic" is precisely equivalent to "corporation," it is redundant; but if, on the contrary, "body politic" is somewhat broader, and should be understood to include a government, such as a State, while "corporation" should be confined to an association of natural persons on whom government has conferred continuous succession, then the provision goes further than is convenient. It requires the draughtsman, in the majority of cases of employing the word "person," to take care that States, Territories, foreign governments, &c., appear to be excluded.
>
> 1 REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS 19 (1872) (Revisers' Note).

3. *E.g., United States* v. *Hughes*, 52 U.S. (11 How.) 552, 568 (1850); *Dugan* v. *United States*, 16 U.S. (3 Wheat.) 172, 181 (1818), cited Resp. Br. 28 n.25.

4. Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431.

In 1874 Congress adopted the recommended change as a part of the first section of the Revised Statutes.[5]

Respondents argue that this history is insignificant because Congress did not intend the Revised Statutes to be a source of "new law" and because the Joint Committee on the Revision of the Laws had engaged the services of T. J. Durant to remove the Commissioners' substantive changes from the revision. Resp. Br. 35 n.36. Respondents also suggest that Congress was unaware of the purpose of the 1874 revision, that "Congress considered the Durant draft, not the Commission's," and that "Durant [had] removed all of the notes provided in the Commission's draft before the proposed statutes were presented to Congress." Resp. Br. 35 n.36. We respond to each of these claims.

First, the revised definition of "person" was not a substantive change. Rather, the enactment of 1871 had contained an ambiguity which the Commissioners discovered and eliminated, replacing the ambiguous term, "bodies politic and corporate," with "corporations." It was the revisers' acknowledged task to place a clear construction on the statutes. *See* 2 CONG. REC. 826 (1874) (remarks of Rep. Lawrence). The general definition of "person" had been adopted to permit statutory revision upon a uniform pattern, and it was also to apply in statutes subsequently enacted. The construction which the Commissioners placed on the term "bodies politic and corporate" was sound and well supported.[6]

5. Act of June 22, 1874, 18 Stat., pt. 1, at 1, 1092.

6. BURRILL'S LAW DICTIONARY (2d ed. 1867) defined "body politic" as "[a] term applied to a corporation, which is usually designated as a *body corporate and politic*." *Id.* 212 (emphasis in original). BLACK'S LAW DICTIONARY of 1891 also indicated that a corporation "is usually designated a body corporate and politic." *Id.* 143. For the history of the term "body politic and corporate," see, e.g., *Warner* v. *Beers*, 23 Wend. 103, 122-23 (N.Y. 1840), indicating, in substance, that the term meant corporations, such as a University or a medieval guild. In popular usage, "bodies politic" has come to mean "political bodies," but the term was derived, not from politics, but from the "policy" of the law, which conferred continuous succession upon the bodies in question, even though their membership might vary. For the etymology of the term, see *People* v. *Morris*, 13 Wend. 325, 334 (N.Y. 1835), quoting Lord Coke. Respondents have apparently misunderstood their quotation from

As for the claim that Congress was unaware of the reason for the revision, the record of debate indicates that *both* the Durant draft and the Commissioners' Report, with its explanatory notes, were before Congress when it considered and enacted the Revised Statutes. As Representative Lawrence stated upon introducing the matter, "[t]he commissioners, *whose revision in two volumes is now before us,* and Mr. Durant, whose work is also here, . . . have all certainly displayed great learning, ability, and skill in this very difficult and herculean labor assigned them." 2 CONG. REC. 826 (1874) (emphasis added).

The revised definition of "person" appeared on the very first page of the Revised Statutes, as submitted for enactment. The reason for the change was clearly explained in the Report of the Commissioners. There is evidence that Congress critically considered the revision of the definitional statute, since it altered the proposed definition of "vessel," which also appeared on the first page of the Revised Statutes. Pet. Br. 24 n.30, citing 2 CONG. REC. 822 (1874); *see* UNITED STATES REVISION OF THE LAWS 1 (Report of T. J. Durant, 1873). But Congress adopted the Commissioners' revised definition of "person," and the principal members of Congress who were concerned with the Revised Statutes included Senator Edmunds and Representative (later Senator) G. F. Hoar, who subsequently drafted the Sherman Act. *See* Pet. Br. 17-18, 24 n.30.

The Department of Justice contends that Congress's deletion of the reference to bodies politic is not significant since "the definition . . . was phrased in illustrative words of inclusion . . . ." Gov. Mem. II at 9. But the "illustrative

Blackstone, who used "corporations" as a term interchangeable with "bodies politic." *See* Resp. Br. 28 n.24 citing 1 W. BLACKSTONE, COMMENTARIES *123. This Court used the term "body politic" to mean corporation in *Louisville, C. & C. R. R.* v. *Letson*, 43 U.S. (2 How.) 497, 552 (1844) and again in *United States* v. *Fox*, 94 U.S. 315, 321 (1876) ("bodies politic, deriving their existence and powers from legislation"). *See In re Fox*, 52 N.Y. 530, 535 (1873) (corporations are "artificial persons; bodies politic").

words of inclusion" had formerly included the phrase "bodies politic," and Congress chose to exclude, to omit or delete, those words. It did so in order to establish a rule of statutory construction. Contrary to the Department's suggestion, the definitional statute authorizes extension of the term "person" only to the entities there enumerated. If entities excluded from the definitional statute in 1874 are to be regarded as "persons" under other statutes, the authorization for such deviation from the established rule must be found in the intent of Congress as manifested in those other statutes.[7]

The drafters of the Sherman Act employed an express definition in section 8 to expand the scope of the term "person" somewhat beyond that established by the definitional statute of 1874 and the *Fox* case (*see* Pet. Br. 21-22), but they chose not to extend the term to include foreign governments. They were justified in supposing that, without such an express definition, the Judiciary would not itself undertake that extension.[8]

7. Compare section 13 of the Interstate Commerce Act of 1887, where Congress took care to refer to "any body politic or municipal organization," as well as other kinds of "persons," apparently to assure a remedy for state railroad commissions and the like. Act of Feb. 4, 1887, ch. 104, § 13, 24 Stat. 383-84. When Congress wishes to extend the term "person" to include "foreign governments," it does so by special definition. *See, e.g.*, International Investment Survey Act, 22 U.S.C. § 3102; Atomic Energy Act, 42 U.S.C. § 2014.

8. Respondents argue that the reference in sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 & 2) to "commerce among the several States, or with foreign nations," suggests that Congress wished to protect foreign nations. Resp. Br. 19-20. But, as this Court has held, that language was "the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes." *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 495 (1940); *see Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 434 (1932). The use of language from the Constitution resolved the problem of the possible overbreadth of Senator Sherman's bill, which had been discussed at length in the Senate. Pet. Br. 17-18. The treble damage remedy itself "was conceived of primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977). *See* Pet. Br. 10-11. There is no evidence of an intent to benefit foreign nations.

3. Contrary to Respondents' Claim, the Decisions of this Court Have Respected the Rule of Construction Established by Congress in 1874.

Respondents suggest that the purpose of the 1874 revision should be disregarded since, as they claim, "not once in 103 years has a court held that the 1874 'revised' statute . . . divested a governmental body of a remedy accorded to 'any person.'" Resp. Br. 34. But respondents appear to have overlooked the Court's decision in *United States* v. *United Mine Workers,* 330 U.S. 258 (1947), where it referred to the Revised Statutes' definition of "person" and held that it reflected an intent of Congress to exclude sovereign governments. As the Court stated,

> Congress made express provision, R.S. § 1, 1 U.S.C. § 1, for the term [person] to extend to partnerships and corporations . . . . The absence of any comparable provision extending the term to sovereign governments implies that Congress did not desire the term to extend to them.
> 330 U.S. at 275.

In *Cooper* and *Fox* the Court applied the same rule to deny a benefit to a sovereign government.

The Justice Department observes that, despite elimination of the words "bodies politic" from the definition of "person," cities and states of the Union are allowed to seek treble damages under the Sherman Act, and contends that, since the decisions have gone that far, this Court should go further and impute to Congress an intent to extend the cause of action to all "political bodies." Gov. Mem. II 8-9. But the cause of action was extended to cities because they were "corporations." *See City of Atlanta* v. *Chattanooga Foundry & Pipeworks,* 127 F. 23, 25 (6th Cir. 1903) (Lurton, J.), *aff'd,* 203 U.S. 390 (1906). It was extended to States of the Union in *Georgia* v. *Evans,* 316 U.S. 159 (1942), because the "legislative environment" (*id.* 161) showed that Congress intended to protect the States, and denial of a federal damage remedy might have left the States with "no recourse whatever" against conduct prohibited under both state and federal law. 316 U.S. at 162-63. *See* Pet. Br. 27-31.

On the other hand, the cause of action for treble damages was denied to the United States, the domestic sovereign, even though its proprietary interests were substantially the same as those of American consumers, whom Congress sought to protect in the Act. This Court held that "it is not our function to engraft on a statute additions which we think the legislature logically might or should have made." *United States* v. *Cooper Corp.,* 312 U.S. 600, 605 (1941). The proprietary interests of foreign governments were not among those which Congress sought to protect, and Congress manifested no desire to give such governments a role in enforcing the Act. The establishment of a damage remedy or enforcement role for such governments lacks even "logical" appeal, and it was not authorized by the legislature.

The respondent foreign governments insist that a number of cases decided by this Court outside the antitrust field conflict with the rule of construction adopted by Congress upon revision of the statutes in 1874. *See* Resp. Br. 34. But respondents' claims for those cases are grossly exaggerated. None concerned a foreign government. Only two of the cases held that a State was a "person." In one of those, the legislative history revealed a clear intent, expressed by the manager of the bill on the floor of the House of Representatives, to include the States, and "it would have defeated the very purpose for which Congress framed the scheme for regulating waterfront terminals to exempt those operated by governmental agencies." *California* v. *United States,* 320 U.S. 577, 585-86 (1944).[9] The result in the other case, *Ohio* v. *Helvering,* 292 U.S. 360 (1934), was dictated by considerations of federalism, *i.e.,* the need to

9. Respondents have edited their quotation from this decision in such manner as to alter its meaning. *See* Resp. Br. 17 n.10. The Court indicated it was unnecessary to "waste time on useless generalities" about the extension of the term person to include the States; but that was only *"if its* [the act's] *plain purposes preclude their exclusion."* 320 U.S. at 585 (emphasis added). Respondents have inserted an ellipsis in their quotation in place of the italicized language. *See* Resp. Br. 17 n.10.

maintain an existing system of federal taxation against efforts to divert the same revenues into the treasuries of the States.[10]

Respondents' remaining cases (Resp. Br. 34) do not concern the question whether a sovereign government is a "person."[11] The cases are consistent with the rule which Congress adopted in 1874 and which this Court applied in *Fox, Cooper* and *United Mine Workers.*

10. When South Carolina took over the liquor business in that State, this Court held that state employees ("dispensers") were "persons" upon whom the United States could impose an existing tax. *South Carolina* v. *United States,* 199 U.S. 437, 448 (1905). When Ohio sought to defeat the system of federal taxation in a similar manner some thirty years later, this Court had no difficulty in concluding that Congress had intended to impose the tax on any "person" —including a State—that might undertake the business. *Ohio* v. *Helvering,* 292 U.S. 360 (1934). Both decisions were dictated by considerations of federalism—the need to protect the federal revenue against conflicting demands by the States.

11. *Nardone* v. *United States,* 302 U.S. 379 (1937), held that federal agents were persons. *Helvering* v. *Stockholms Enskilda Bank,* 293 U.S. 84 (1934), held that income from the United States government was from a "resident" for purposes of the tax code and suggested that this was a "legal fiction" necessary for the sensible application of the tax laws. 293 U.S. at 92.

Our adversaries contend that in *Swiss Confederation* v. *United States,* 70 F. Supp. 235, 236-37 (Ct. Cl.), *cert. denied,* 332 U.S. 815 (1947), the Court of Claims allowed foreign governments to sue "under a federal statute that did not include foreign states in its enumeration of eligible plaintiffs . . . ." Gov. Mem. II at 8; *see* Resp. Br. 30 n.30. But the statute in question contained *no such enumeration at all.* It gave the Court of Claims jurisdiction of " 'all claims . . . in respect of which . . . the party would be entitled to redress against the United States,' [with] no limitation on the right of any party to sue because of his nationality, corporate status, or for any other reason." 70 F. Supp. at 236. The court did refer to a limitation imposed on enumerated parties who were " 'citizens or subjects' " of certain foreign governments, but held that, since foreign governments themselves were not enumerated, they were not subject to the limitation. *Id.*

The dictum in *Stanley* v. *Schwalby,* 147 U.S. 508 (1893), suggested that if the United States could be sued under Texas Law, it would be entitled to claim the benefit of repose under a Texas statute of limitations which referred to "persons;" but the Court noted that a Texas decision had held that the State of Texas was itself a "person" (147 U.S. at 517), and the dictum appears to reflect the principle of federal supremacy, which had long required the federal courts to regulate application of state statutes of limitation to the federal government, assuring it uniform prerogatives throughout the nation. *See, e.g., United States* v. *Hoar,* 26 Fed. Cas. 329 (C.C.D. Mass. 1821) (No. 15,373).

4. Congress Understood that the United States Had No Recourse to the Treble Damage Remedy Because It Was Not a "Person."

Respondents contend that the remarks of Senator Sherman establish that Congress intended to deny the United States any damage remedy, irrespective of the question whether the United States was a "person." Resp. Br. 14-15. But when Senator Sherman said that the civil damage action was "not to be prosecuted at all by the United States" (21 CONG. REC. 2563 (1890)), he referred to the second section of his bill, which conferred a cause of action only upon a "person or corporation injured or damnified." *See id.* His statement undoubtedly reflected the view that the United States was not a "person or corporation." And if that language gave the United States no claim for damages incurred, neither it nor the language subsequently employed by the Senate Judiciary Committee gave such a claim to the sovereign governments of foreign nations.

Respondents suggest that, unlike other sovereign governments, the United States had no need for a damage remedy since it had chosen for itself other weapons of enforcement. Resp. Br. 15. But the weapons referred to are not for "self-protection," as respondents assert (*id.*), but for the protection of the public. Their use may contribute to the protection of all who seek to purchase from American business. But in 1890 and again in 1914 Congress denied the United States any remedy for damages incurred in its proprietary capacity. If Congress thought it unnecessary to give the domestic sovereign any remedy for damages incurred, it surely saw no need to give such a remedy to foreign governments.

5. Contrary to Respondents' Assertion, The Common Law of Restraints of Trade Gave No Cause of Action for Damages.

Respondents suggest that foreign governments would have had "common law rights" when injured by a contract in restraint of trade, that the Sherman Act merely opened "the federal courts to all who were injured," and that Con-

gress would not have wished to deny foreign governments a statutory damage remedy which corresponded to their pre-existing common law right to damages. Resp. Br. 8. In this, however, respondents appear to misunderstand the common law. Contracts in restraint of trade "were deemed illegal and were unenforcible at common law. But the resulting restraints of trade were not penalized and gave rise to no actionable wrong." *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 497 (1940). The same point was made in *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 279 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899), where Circuit Judge Taft noted that "all the law lords were of opinion [in *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, [1892] App. Cas. 25] that contracts void as in restraint of trade . . . gave no right of action for damages to one injured thereby." 85 F.2d at 286.[12]

In section 1 of the Sherman Act, Congress prohibited combinations in restraint of trade, without identification of the parties to such combinations, but it established criminal

12. The common law cases cited by Senator Sherman in the anti-trust act debates (21 CONG. REC. 2458-59 (1890)), concerned the enforcibility of contracts said to be in restraint of trade, not claims for damages. *See, e.g., Chicago Gas Light & Coke Co.* v. *People's Gas Light & Coke Co.*, 121 Ill. 530, 13 N.E. 169 (1887); *Richardson* v. *Buhl*, 77 Mich. 632, 43 N.W. 1102 (1889). *Cf. People* v. *North River Sugar Ref. Co.*, 121 N.Y. 582, 24 N.E. 834 (1890) (statutory dissolution of corporation for violation of its charter). The Statute of Monopolies of 1623 represented an effort by Parliament to restrain the King's power to grant monopolies; its treble damage remedy had no application to common law restraints and, contrary to the suggestion of the Department of Justice (Gov. Mem. II 7 n.8), it was undoubtedly unavailable to foreign governments. As the Court of King's Bench pointed out in 1685, the King retained "controlling power over all trade with infidels . . . over all foreign trade in general . . ." *East-India Co.* v. *Sandys*, 90 Eng. Rep. 103, 104 (K.B. 1685). The statute itself was irrelevant to the American scene. *See* Adler, *Monopolizing at Common Law and Under Section Two of the Sherman Act*, 31 HARV. L. REV. 246, 258 (1917); Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355, 366 (1954). The arcane common law offenses of forestalling, regrating and engrossing gave rise to no damage action. "[T]he general penalty for these three offenses, by the common law (for all the statutes concerning them were repealed by 12 Geo. III., c. 71 [1772]), is, as in other minute misdemeanors, discretionary fine and imprisonment." 4 W. BLACKSTONE, COMMENTARIES *159.

penalties only for the "persons" who might participate in them. In section 2 it established criminal penalties for "persons" who monopolize. In section 7 it created a cause of action for treble damages and attorney's fees, which had been unknown to the common law, and it conferred that cause of action only upon "persons." In so doing it deprived neither itself nor any other sovereign government of any pre-existing common law remedy.[13]

6. The Decision in *Georgia* v. *Evans* Created an Exception Solely for the States of the Union, Which Have Yielded Their Sovereign Powers Over Interstate and Foreign Commerce to Congress.

Respondents suggest that this Court "contemplated standing for foreign countries" when it decided *Georgia* v. *Evans*. Resp. Br. 16. They point to language from that case referring to a Congressional intent "to bring state or nation within the scope of the law." *Id.* But they have omitted the interior quotation marks which would have shown that the Court was itself quoting from *United States* v. *Cooper Corp.*, 312 U.S. at 604-05. *See Georgia* v. *Evans*, 316 U.S. at 161. The Court's purpose in quoting from the earlier decision was to show that the premises of the two decisions were in fact consistent. In *Cooper* the Court had held that a "nation" was not a "person," and the *Georgia* Court confirmed that, although States of the Union were "persons," it was not disturbing the earlier decision as to the "nation."

The respondents also suggest that this Court has laid down criteria for determining the scope of the term "per-

13. As respondents point out (Resp. Br. 30 n.29; *see* Gov. Mem. II 8), after enactment of the Sherman Act the French Republic, as owner of the Vichy spring, brought a common law action to enjoin the use of that name by an American bottling concern, which it charged with the common law tort of unfair competition. *See French Republic* v. *Saratoga Vichy Spring Co.*, 191 U.S. 427, 434 (1903). The City of Carlsbad brought similar actions. *See City of Carlsbad* v. *Kutnow*, 68 F. 794 (C.C.S.D.N.Y.), *aff'd*, 71 F. 167 (2d Cir. 1895); *City of Carlsbad* v. *Schultz*, 78 F. 469 (C.C.S.D.N.Y. 1897). But these were not "antitrust type" actions. They were common law actions in which the plaintiffs sought to vindicate their property rights in a commercial name.

son" which "require an inclusive interpretation." Resp. Br. 16. But the criteria to which respondents refer are "aids to construction which may indicate an *intent*." *United States* v. *Cooper Corp.*, 312 U.S. 600, 604-05; *Georgia* v. *Evans*, 316 U.S. 159, 161 (emphasis added). We have already shown that "[t]he purpose, the subject matter, the context, [and] the legislative history" all indicate that Congress did not desire to extend to foreign governments the treble damage remedy which it withheld from the United States. Contrary to respondents' suggestion (Resp. Br. 16), the "executive interpretation," as reflected in the present position of the Justice Department, offers no guidance as to the intent of Congress in 1890. Indeed, previous statements and practice suggest a more traditional view on the part of the Executive that foreign governments have no claim for treble damages.[14]

In *Georgia* v. *Evans* the Court held that the question "[w]hether the word 'person' or 'corporation' includes a State or the United States depends upon its legislative environment." 316 U.S. at 161. If "legislative environment" is indeed the test, it is plain that Congress wished to protect the States, but granted no cause of action to foreign governments. *See* Pet. Br. 13-15; 21 CONG. REC. 4253 (May 7, 1890) (remarks of Representative McKinley).

Respondents claim that the "legislative atmosphere" or "legislative climate" should be disregarded since they think it reveals a "jingoistic proclivity." Resp. Br. 9. But it is indisputable that the Congresses that wrote the antitrust laws sought in good faith to protect the interests of the United States, and it was their task under the Constitution to formulate national economic policy. Accordingly, the "economic judgment" of Congress is "quite relevant in

14. *See, e.g.*, Letter from Attorney General Herbert Brownell to Senator Harley M. Kilgore (June 16, 1955), *reprinted in* S. REP. No. 619, 84th Cong., 1st Sess. 7 (1955), discussed Pet. Br. 26. *See also* REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS at 385 (1955). Compare the former practice of authorizing joint resistance by American oil companies against economic demands by foreign governments, discussed in the petition for certiorari at 11 n.6.

interpreting the language Congress chose." *See United States* v. *Concentrated Phosphate Export Association*, 393 U.S. 199, 208 (1968). An intention to authorize treble damage suits by foreign governments would have been inconsistent with that economic judgment, and such an intention cannot fairly be imputed to Congress.

II.

Respondents' Policy Arguments Provide No Basis For Judicial Extension of the Treble Damage Action to Foreign Governments.

The evidence establishes that Congress did not seek to benefit foreign governments (*see* Pet. Br. 10-15) and that it legislated in terms which it understood to preclude treble damage suits by such governments. That being so, it is idle for respondents to contend that "policy" arguments call for such suits. Such arguments should be addressed to Congress. In advancing them here, respondents misconceive the role of the Judiciary, particularly in the delicate areas of foreign relations, the balance of payments and national fiscal policy. *See United States* v. *Gilman*, 347 U.S. 507, 511 (1954); *United States* v. *Standard Oil Co. of California*, 332 U.S. 301, 314 (1947).

1. The Help of Foreign Governments is Not Essential to the Enforcement of Our Antitrust Laws.

Citing the 1971 decision by the District Court, respondents suggest that the "real question" in these cases is not the intent of Congress, but "'whether the maintenance of [treble damage actions by foreign governments] is essential to the effective enforcement of the antitrust laws.'" Resp. Br. 3; A 7. The Court of Appeals found it unnecessary to comment on this assertion, no doubt because the antitrust laws have been enforced for many years without the aid of foreign governments. The increase in private treble damage cases over the past ten years confirms that there is little danger that those laws may go unenforced.[15]

15. *See* [1977] ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Table 20 ("Antitrust Cases Commenced, Statistical Years 1960-1977").

Indeed, the real question is whether the federal courts will be able to hear and resolve all the antitrust claims of those whom Congress sought to protect.

The Department of Justice apparently agrees that the antitrust laws were not intended to protect "foreign persons in foreign markets."[16] But it summarizes the allegations of the complaints in these cases in order to show that, even though the goods involved were "manufactured in the United States for shipment abroad . . . [or] manufactured abroad by petitioners' licensees or subsidiaries" (Gov. Mem. II at 2), the alleged restraints might have had an impact upon domestic markets. According to the Department's theory, even though Congress had no interest in regulating foreign markets, those who purchase in such markets should nonetheless be allowed to sue under our antitrust laws when they complain of restraints there which would have had a simultaneous impact within the United States. In that case, says the Department, foreign purchasers should gain a cause of action, not because Congress wished to protect them, but because authorization of such suits may further the goal of deterring domestic violations.[17]

16. *See* Pet. Br. 11, quoting from Address by Douglas E. Rosenthal, Assistant Chief, Foreign Commerce Section, Antitrust Division, Department of Justice, to the American Society of International Law Annual Meeting (April 23, 1977) ("Rosenthal Speech") at 9. The full text of the speech has been lodged with the Clerk of the Court by the Department of Justice. *See* Gov. Mem. II 12 n.12.

17. Rosenthal Speech 6-10, 14-15. While the merits of the Department's choice of law theory are not before the Court, the proper rule may be that nonresident aliens must have sufficient contacts with the United States before they may claim the protection of our antitrust laws, instead of the economic regulations of the market in which they make their purchases. Courts "must seek to determine whether Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to [such claims] rather than leave the problem to foreign countries." *Bersch* v. *Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975). *See* 51 CONG. REC. 13898 (1914) (remarks of Senator Walsh), indicating the understanding of Congress that the treble damage remedy was available to "any citizen of the United States or denizen of the country who desires to take advantage of it." *Cf.* I FEDERAL TRADE COMMISSION, REPORT ON COOPERATION IN AMERICAN EXPORT TRADE 9 (1916), *quoted* Pet. Br. 34 n.44.

The Department's choice of law theory may or may not possess validity in respect of "persons," as Congress understood that term. But the theory appears to concede that foreign governments were not among those whom Congress sought to protect, and that the principal reason for extending a cause of action to them would be to gain their assistance in protecting our domestic markets. We have already shown that such assistance by foreign governments would not benefit the domestic economy. *See* Pet. Br. 38. If domestic enforcement is the goal, the United States and those under its jurisdiction are fully capable of enforcing the antitrust laws. Indeed, the related litigation furnishes an example of thorough and zealous enforcement by domestic parties.[18]

2. It is Not "Unsound" to Distinguish between Corporations and Sovereign Governments.

In 1890 Congress distinguished sharply between foreign governments and foreign corporations, and it continues to perceive such a distinction, since it has provided in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C.

18. The history of proceedings against petitioners for alleged antitrust violations goes back nearly twenty years to the commencement of an action by the Federal Trade Commission in 1958. *See In re American Cyanamid Co.*, 63 F.T.C. 1747 (1963), *vacated and remanded sub nom. American Cyanamid Co.* v. *Federal Trade Commission*, 363 F.2d 757 (6th Cir. 1966), *In re American Cyanamid Co.*, 72 F.T.C. 623 (1967), *aff'd sub nom. Charles Pfizer & Co.* v. *Federal Trade Commission*, 401 F.2d 574 (6th Cir.), *cert. denied*, 394 U.S. 920 (1968). The Department of Justice brought a criminal action in 1961 against three of the petitioners on the basis of the same allegations which it summarizes, Gov. Mem. II 2, and after extended litigation those petitioners were acquitted on the merits. *See United States* v. *Chas. Pfizer & Co.*, 367 F. Supp. 91 (S.D.N.Y. 1973). A total of 166 separate damage actions were filed. Suits by foreign governments were among the last to be filed, after a large number of the cases had been disposed of by settlement. In the only one of the damage cases which has been tried to a conclusion, petitioners prevailed on the merits. *See North Carolina* v. *Chas. Pfizer & Co.*, 384 F. Supp. 265 (E.D.N.C. 1974), *aff'd*, 537 F.2d 67 (4th Cir.), *cert. denied*, 429 U.S. 870 (1976). For the history of the litigation, see *West Virginia* v. *Chas. Pfizer & Co.*, 314 F. Supp. 710, 741-42 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

§§ 1602-1611 (1976), that foreign sovereigns may not be held liable for punitive damages, even in connection with commercial activities, although their "agency or instrumentality" (defined as "a separate legal person, corporate or otherwise") may be so liable. *See id.* §§ 1603(b)(1), 1606; Pet. Br. 33.[19]

Contrary to respondents' assertion (Resp. Br. 18), it is sound and reasonable to distinguish between sovereign foreign governments and other parties who are more fully subjected to the authority of Congress. Congress included foreign corporations in the definition of "person" because it was aware that they sometimes engaged in anticompetitive activities in the United States, and it wished to give them both the benefits and the burdens of our law. *See* Pet. Br. 22. Thus, a foreign government-owned corporation is subject to the antitrust laws. *See United States* v. *Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199 (S.D.N.Y. 1929), and cases cited, Pet. Br. 32. Such a corporation may also sue for treble damages. *See United States and Tennessee Valley Authority* v. *General Electric Co.*, 209 F. Supp. 197, 203-05 (E.D. Pa. 1962). In contrast to government-owned corporations, sovereign governments themselves possess an immunity—full or partial—from liability for treble damages.[20] The decision to deny foreign govern-

19. A similar distinction has been proposed by the Federal Trade Commission, with the concurrence of the Justice Department, under a provision of the Hart-Scott-Rodino Antitrust Improvement Act of 1976. 15 U.S.C. § 18a (1976). *See* Pet. Br. 32 & n.39. In the same act, Congress also granted special enforcement powers to the States, but not to foreign governments. *See* 15 U.S.C. § 15c. *See* Pet. Br. 37-38 & n.49.

20. *See* Pet. Br. 33 n.41. Certainly foreign governments are not "persons" on whom the criminal penalties of sections 1 and 2 of the Sherman Act may be imposed. Although private parties who conspire with foreign governments may be liable for damages, it appears that Congress did not seek to impose antitrust liability upon sovereign governments themselves. *See Parker* v. *Brown*, 317 U.S. 341, 351 (1943); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976); *Bates* v. *State Bar of Arizona*, 97 S. Ct. 2691 (1977). In 1890 Congress regarded sovereign immunity as a principle of international law (*see The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812)), just as it believed that it lacked power under the Constitution to punish municipalities. *See Moor* v. *County of Alameda*, 411 U.S. 693, 708-10 (1973). "[I]n interpreting the statute it is not our task to consider whether Congress was mistaken . . . in its view of the limits of its power . . .; rather, we must construe the statute in light of the impressions under which Congress did in fact act." 411 U.S. at 709. Congress left it to the Judiciary to define the scope of interstate commerce under the Constitution, but it regarded other terms and features of the law as settled. *See* Pet. Br. 23 & n.29.

ments the corresponding cause of action under our law was not unfair or discriminatory. Rather, it reflected the view that the United States need not seek to regulate the relationships between foreign governments and their suppliers to the same extent that it regulates the relationships of private parties under its jurisdiction. *Cf. National League of Cities* v. *Usery*, 426 U.S. 833 (1976).

Foreign governments will not be able to circumvent Congress's definition of "person" by dubbing their various ministries "corporations." If a particular government corporation has no independent existence and is but a governmental department, very likely it is not what Congress had in mind when it provided that "corporations" should be deemed to be persons.[21]

21. A number of cases have held that a statewide government agency, though organized in corporate form, must be regarded as the State itself for purposes of the diversity jurisdiction, 28 U.S.C. § 1332(c). *E.g., State Highway Commission* v. *Utah Construction Co.*, 278 U.S. 194 (1929). But incorporated agencies which have interests distinct from those of the State—because they represent local groups, for example—are held to be separate corporate persons for purposes of the diversity jurisdiction. *E.g., Moor* v. *County of Alameda*, 411 U.S. 693 (1973). Amicus West Germany insists that it is both a sovereign nation and a "corporation" organized under its own law. Ger. Br. 2-3. But when Congress excluded foreign governments from the definition of "person," it established two mutually exclusive categories. West Germany cannot obtain the privileges of "personhood" under the regulation of Congress while it also retains sovereign power to regulate international trade in a manner inconsistent with the regulation of Congress. *See United States* v. *Cooper Corp.*, 312 U.S. 600, 607 (1941) ("We may say in passing that the argument that the United States may be treated as a corporation organized under its own laws . . . seems so strained as not to merit serious consideration").

3. Foreign Governments Are Not Helpless Victims of Restraints of Trade; In the Field of International Commerce They Have "Public Enforcement Powers" at Least as Broad as Those of the United States.

The Department of Justice asserts that the ground of decision in *Georgia* v. *Evans* was that the States of the Union lacked "the public enforcement powers of the United States." Gov. Mem. II 5. If so, that decision is clearly inapplicable to foreign governments. While the States have ceded to Congress their powers over interstate trade, foreign governments retain sovereign power, and their jurisdiction over international trade is as broad as that of the United States. Thus, a decision that a foreign government may obtain treble damages in our courts would leave it free to exercise its "public enforcement powers" in its own courts in respect of the same alleged restraints. Unlike a State, it could impose cumulative sanctions on the wrongdoer. And it could enforce policies which conflict with those of the antitrust laws.[22]

Amicus West Germany suggests here that it may be "totally without remedies" under its own law. Ger. Br. 11 n.17. But West Germany's public enforcement powers under its own antitrust law include injunction, fines, price rollbacks and even establishment of a maximum price.[23]

22. For evidence that foreign economic policies may conflict with our own, *see, e.g., Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972); *International Refining Corp.* v. *Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970); *United States* v. *Watchmakers of Switzerland Information Center*, 133 F. Supp. 40 (S.D.N.Y. 1955); *British Nylon Spinners, Ltd.* v. *Imperial Chemical Industries, Ltd.*, 2 All Eng. Rep. 780 (C.A. 1952).

23. *See* Gesetz gegen Wettbewerbsbeschränkungen [Act Against Restraints of Competition] ("GWB"), Law of July 27, 1957, [1957] Bundesgesetzblatt [BGBl] I 1081, as amended by Law of Aug. 3, 1973, Bundesgesetzblatt [BGBl] I 917 (W. Ger.). *See especially id.* § 37(a) (injunctive order); §§ 38, 39 (fines). Fines may be fixed as high as three times the profits realized as a result of an illegal trade practice. GWB § 38(4). *See* Markert, *Recent Developments in German Antitrust Law*, 43 FORDHAM L. Rev. 697, 707 (1975). As to price rollbacks and establishment of a maximum price, see Judgment of July 3, 1976, 67 BGHZ 104 (W. Ger. Sup. Civ. Ct.) (Merck case) (summarized in COMM. MKT. REP. (CCH) ¶ 30,905). *See also* Judgment of Dec. 16, 1976 (W. Ger. Sup. Civ. Ct.) (Hoffman-La Roche case) (summarized in COMM. MKT. REP. (CCH) ¶ 30,933). The German antitrust law also authorizes the filing of private suits for injunction and damages. GWB § 35.

The Federal Republic is further protected by the antitrust provisions of the Common Market's Treaty of Rome.[24]

It is significant that on the day certiorari was granted in these cases, the German Federal Cartel Office exercised its public enforcement powers by serving a demand letter upon petitioner Pfizer's German subsidiary advising that the Office had commenced a proceeding under the German antitrust law. The letter alleges that the Pfizer subsidiary has a "market dominating position" in connection with its broad spectrum antibiotic products and that such position has been reflected in its market prices. The proceedings which are now in progress in Germany concern some of the very drugs which are the subject of West Germany's treble damage action in the United States, and the charges there parallel those of the complaint here.[25]

The Philippines and India also possess antitrust legislation.[26]

Nor can respondents fairly contend that their legislation is "ineffective in securing jurisdiction over individuals in the United States who are responsible for the injury."

24. Articles 85-99 of the Treaty Establishing the European Economic Community, March 25, 1957, 294 U.N.T.S. 2. Another treaty also assures West Germany the assistance of the Department of Justice in the enforcement of the German antitrust law against American businesses. *See* Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, United States-Federal Republic of Germany, [1976] 27 U.S.T. 1956, T.I.A.S. No. 8291.

25. *See* complaint in *Federal Republic of Germany* v. *Pfizer Inc.* (D. Minn. No. 4-74-614). For the convenience of the Court a copy of the West German demand letter and an English translation have been lodged with the Clerk of the Court.

26. PHILIPPINES REV. PENAL CODE, art. 186 (1972); India Monopolies and Restrictive Trade Practices Act, 1969, 14 INDIA A.I.R. MANUAL 657 (1972). For an example of further economic regulation by India, see Foreign Exchange Regulation Act, 1973, [1973] A.I.R. (INDIAN ACTS) 183, under which India is seeking to require IBM and Coca-Cola to divest themselves of majority ownership of Indian subsidiaries. *See* N.Y. Times, Oct. 1, 1977, at 25, col. 4.

Resp. Br. 5. Foreign courts can and do apply principles like those of *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), in order to restrain conduct outside their borders which has an impact within.[27] Indeed, American firms with no office in the Common Market countries have already been prosecuted under antitrust provisions of the Treaty of Rome.[28] As long as the American defendant has sufficient contacts with the foreign country to satisfy "traditional notions of fair play and substantial justice," the exercise of jurisdiction by the foreign country would not conflict with due process or international law. *See International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945); *The S. S. Lotus*, [1927] P.C.I.J., ser. A, No. 10; Mann, *The Doctrine of Jurisdiction in International Law*, 3 HAGUE ACADEMY RECUEIL DES COURS 1, 13 (1964).[29]

27. *See, e.g.*, GWB § 98(2), which makes the German antitrust law applicable to all restraints "which have effects in the territory in which this Act applies, even if they result from acts done outside the territory."

28. *See, e.g., Europemballage Corp. and Continental Can Co.* v. *Commission of the European Communities*, [1973] E. Comm. Ct. J. Rep. 215, 242, 12 Comm. Mkt. L. R. 199, 222 (1973).

> Community law is applicable to . . . an acquisition which, influences market conditions within the Community. The circumstance that [the American company] does not have its registered office within the territory of one of the Member States is not sufficient to exclude it from the application of Community Law. [1973] E. Comm. Ct. J. Rep. 242.

See also Istituto Chemioterapico Italiano SpA and Commercial Solvents Corp. v. *Commission of the European Communities*, [1974] E. Comm. Ct. J. Rep. 223, 13 Comm. Mkt. L. R. 309 (1974).

29. In the instant cases, respondents allege that the petitioning pharmaceutical companies do business around the world, including Iran, the Philippines and India. A 15-16, 75-76, 108-110. The record also indicates that petitioners hold patents under German, Indian and Philippine law. A 144-46. Although United States courts would not enforce foreign administrative sanctions or punitive judgments (*see Huntington* v. *Attrill*, 146 U.S. 657 (1892)), our courts might indeed enforce a compensatory judgment, either under principles of comity (*see Hilton* v. *Guyot*, 159 U.S. 113, 205-06 (1895)); *British Midland Airways Ltd.* v. *International Travel, Inc.*, 497 F.2d 869 (9th Cir. 1974)) or under the Uniform Foreign Money Judgments Recognition Act. *See, e.g.*, ILL. REV. STAT. ch. 77, §§ 121-129 (1973); MASS. GEN. LAWS ANN. ch. 235, § 23A (West Supp. 1977); N.Y. CIV. PRAC. LAW §§ 5301-5309 (McKinney Supp. 1976).

Contrary to respondents' assertion, foreign governments can obtain evidence from United States concerns by subpoena, or by letters rogatory. FED. R. CIV. P. 28(b). Moreover, the Attorney General has recently expressed eagerness to assist other governments in the prosecution of their antitrust laws, at the same time deploring the fact that a number of those governments have purposefully enacted "'blocking' legislation solely to frustrate U.S. antitrust laws . . . ." *See* Address by Attorney General Bell, American Bar Association Assembly Luncheon 2, 6 (Aug. 8, 1977), *reprinted in* [1977] 155 DAILY REP. FOR EXECUTIVES (BNA) at B-1, B-2.

Even without a cause of action for treble damages, foreign governments which deal with American businesses benefit from our antitrust laws and their enforcement by the United States and private persons. Perhaps no other country in the world has gone so far to enforce the principles of free competition and, indirectly, to extend the benefits of such competition to foreign nations, many of which seek to restrain their own trade in order to impose high prices on American consumers.

Conclusion

There is no evidence whatever that Congress wished to authorize treble damage suits by foreign governments. It legislated in terms which it understood to preclude such a result. At a time when some of the world's foreign governments have combined to extract a maximum from our domestic economy, the Judicial Branch should not undertake to extend the treble damage provision of our antitrust laws for the benefit of such governments. If a magnanimous gesture is called for, it should be made by Congress.

Accordingly, for the reasons set forth above and in our principal brief, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

JULIAN O. VON KALINOWSKI
JOE A. WALTERS
JOHN H. MORRISON
JOHN P. LYNCH
Attorneys for Petitioner
Pfizer Inc.

MERRELL E. CLARK, JR.
Attorney for Petitioner
Bristol-Myers Company

ROBERTS B. OWEN
Attorney for Petitioner
The Upjohn Company

SAMUEL W. MURPHY, JR.
PETER DORSEY
KENNETH N. HART
WILLIAM J. T. BROWN
Attorneys for Petitioner
American Cyanamid Company

ALLEN F. MAULSBY
Attorney for Petitioners
Squibb Corporation and
Olin Corporation

GORDON G. BUSDICKER
Attorney for Petitioners
Bristol-Myers Company,
The Upjohn Company,
Squibb Corporation, and
Olin Corporation

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